Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Application of ELLIS THOMPSON CORPORATION For Facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134, Atlantic City, New Jersey	CC DOCKET NO. 94-136 File No. 14261-CL-P-134-A-86

To: The Review Board

OPPOSITION TO AMERITEL'S APPEAL OF THE DENIAL OF ITS PETITION TO INTERVENE

American Cellular Network Corp. ("Amcell"), by its attorneys and pursuant to 47 C.F.R. §1.301(c)(7), hereby opposes the "Appeal" filed by Ameritel on March 27, 1995 with respect to the Memorandum Opinion and Order, FCC 95M-68 (March 7, 1995) ("MO&O"), issued by the Presiding Judge denying its Petition to Intervene ("Petition") in the above-captioned proceeding. As shown below, Ameritel has failed to demonstrate either that it is entitled to intervene as a matter of right under Section 1.223(a) of the Commission's Rules or as a matter of discretion under Section 1.223(b), and therefore the Appeal should be denied.

I. Ameritel Has Not Shown That It Meets The Requirements For Intervention As of Right Pursuant to Section 1.223(a)

As the Presiding Judge correctly found in dismissing Ameritel's petition, "Ameritel has failed to establish that it is the successor-in-interest to" a party in interest to the proceeding, and thus does not meet the requirements for intervention set forth in Section 1.223(a) of the Commission's Rules. MO&O at ¶ 3.[1/] Ameritel's effort to meet that burden consisted solely

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[1/] Section 1.223(a) of the Rules allows intervention as a matter of right for a "any person who qualifies as a party in interest" to a proceeding. 47 C.F.R. § 1.223(a). To qualify, a petitioner must "show[] the basis of its interest." Id. (emphasis added).

of a conclusory statement buried in footnote 7 of its Petition that it is the successor-in-interest to Ameritel, Inc., a losing participant in the Atlantic City lottery, which has long since ceased to exist. In its Appeal, Ameritel contends that this bald assertion of party in interest status is adequate because it is "based" on a "Declaration of Richard Rowley," attached as exhibit 2 to Ameritel's Petition. However, that declaration merely reiterates that Ameritel is the successor-in-interest to Ameritel, Inc., without providing any supporting information.[2/] Such self-serving declarations are insufficient to meet the requirements of Section 1.223(a).[3/] Ameritel's reliance on Algreg Cellular Engineering, 6 FCC Rcd 5299 (Rev. Bd. 1991), to the contrary is misplaced. That case stands only for the proposition that mutually exclusive applicants are entitled to party status; it is silent as to the showing required where, as here, such status is demonstrably in dispute. Id. In fact, as shown below, Ameritel is not a mutually exclusive applicant in Atlantic City and it offers no legal support whatsoever for its claimed right of intervention. In essence, Ameritel's argument is that it is a party because it says that it is a party. The Presiding Judge was thus correct in denying Ameritel's request for intervention as of right under Section 1.223(a).

II. Ameritel Is Not Entitled To Discretionary Intervention Under Section 1.223(b)

Ameritel also appeals the Presiding Judge's denial of discretionary intervention under 1.223(b). However, because 1.223(b) expressly requires, inter alia, that the petitioner "must set forth [its] interest . . . in the proceeding," 47 C.F.R. § 1.223(b), Ameritel's case for discretionary intervention is linked inextricably to its argument that it qualifies as a party in interest under 1.223(a).

2/ The declaration, in pertinent part, states "I am a general partner in Ameritel ("Ameritel"), successor-in-interest to Ameritel, Inc." Declaration, ¶ 1.

3/ It is well-settled that the standards for judging petitions to intervene and petitions to deny are the same. See, e.g., Radio Lares, 63 FCC 2d 305, 306 (1977). Ultimate, conclusory facts averred upon oath are not sufficient. Walter S. Kelly, 9 FCC Rcd. 1923, 1925 (Mass Med. Bur. 1994) (citing Gencom, Inc. v. FCC, 832 F.2d 171, n.11 (D.C. Circuit 1987).

Moreover, in order to qualify for discretionary intervention, Rule 1.223(b) also requires that the petitioner show how its participation "will assist the Commission in the determination of the issues in question." Id. Ameritel is unable to demonstrate how it would be able to do so, beyond offering the Commission its assistance in "fully exploring" the designated issue. It is well settled that "the general public interest role to which appellants advert - assuring development of a full record . . . can be and traditionally has been fulfilled by the ALJ and the [Wireless Telecommunications] Bureau." GAF Broadcasting Company, Inc., 94 FCC 2d 203, 204 (Rev. Bd. 1983). Thus, the Presiding Judge did not, as Ameritel asserts, abuse his discretion by finding that "Ameritel [did] not demonstrate that it will make any specific contribution to the proceeding." MO&O at ¶ 6.

III. Ameritel's Response Is Not Properly Before the Review Board, And In Any Case, Ameritel Cannot Be A Successor-In-Interest to Ameritel, Inc.

Ameritel attaches as exhibit 5 to its Appeal a copy of its March 21, 1995 "Response" to the oppositions and comments[4/] filed by the existing parties to its original Petition. That Response is comprised primarily of an Affidavit of Thomas E. Rawlings ("Rawlings Affidavit"), which purports to substantiate Ameritel's claim that it is a party in interest. The Response and an accompanying "Motion for Leave to File Response" were dismissed by the Presiding Judge as untimely filed. Order, FCC 95M-84 (Released March 24, 1995).[5/] In addition, Section 1.294(b) of the Commission's Rules, specifically states that "replies to [interlocutory pleadings] will not be entertained." 47 C.F.R. § 1.294(b). Thus, the Response is not properly before the

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[4/] The Wireless Telecommunications Bureau and Telephone & Data Systems, Inc. filed joint "Comments on Petition to Intervene" on February 15, 1995. Also on that date, American Cellular Network Corp. filed an "Opposition to Petition for Leave to Intervene." Finally, on February 21, Ellis Thompson Corporation submitted its "Opposition to Petition to Intervene."

[5/] The Response was filed some thirty (30) days after the last of the oppositions was filed and fourteen (14) days after the release of the Presiding Judge's ruling released March 7, 1995. Id., n. 1.

Review Board, and should not be considered.

Even if the Board were to consider the unauthorized Response, which it should not, review of the Rawlings Affidavit contained therein reveals admissions by Ameritel which directly undercut its claim that it has the right to stand in the shoes of the 1986 corporate applicant. It was Commission policy at the time that the applications for Atlantic City were filed that a "tentative selectee must retain majority ownership and control of its application after the lottery."[6/] Obviously, the same policy governed lesser ranked applicants such as Ameritel, Inc., on whose claim to potential tentative selectee status Ameritel's case for intervention is entirely based. Moreover, the then operative Commission rule concerning transfers of control provided that a "change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control."[7/] Yet, as averred by Rawlings, "[i]n April of 1987 AMERITEL (OH) redeemed the stock owned by all of its then current shareholders except for Gene Folden, Thomas E. Rawlings, David C. Rowley and Richard D. Rowley." Roughly a year before, on February 25, 1986, Messrs Folden, Rawlings, Rowley and Rowley had reported to the Commission, in their application for the Daytona Beach, Florida MSA, that they held as of that date[8/] a collective 49% ownership interest in the applicant. Id. The 1987 stock redemption thus

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6/ Public Notice, Guidelines for Settlements and Changes of Ownership of Cellular Systems, Report No. CL-86-99 (Released March 24, 1986), 59 RR 1450, 1451 (Com. Car. Bur.) (emphasis added); see 47 C.F.R. 22.23(c)(4), (g) (repealed 1995) (substantial changes in ownership of applicant result in application being considered newly filed as of date of amendment).

7/ 47 C.F.R. § 22.39(a)(1) (repealed 1995); see also McCaw Cellular Communications, Inc., 4 FCC Rcd 3784, 3788 (Com. Car. Bur. 1989) (any transfer which involves the movement of 50% or more of a licensee's stock is a substantial change of control) (emphasis added).

8/ This was only 19 days after the Ameritel, Inc. Atlantic City application had been filed. Ameritel, Inc., Application for an Initial Cellular Authorization to Construct for the Daytona Beach, Florida MSA (FCC Form 401), File No. 22500-CL-P-146-A-86, Exhibit 1, Applicant's Ownership and Communications Interests (Attached as Exhibit 2 to Amcell's February 15, 1995, Opposition).

was a transfer of more than 50% of Ameritel, Inc.'s stock and collectively placed the transferees in the position of moving from less than 50% to more than 50% under Section 22.39(a)(1). This constituted a substantial change in ownership and control in violation of the Commission's clearly articulated policy and rules, rendering Ameritel, Inc.'s pending application for Atlantic City patently defective.[9/] Thus, neither Ameritel, Inc., nor any entity claiming to be its successor, may prosecute the fifth-ranked Atlantic City application. Upon elevation to tentative selectee status, Ameritel would have to amend its application under Section 1.65 reflecting a substantial change in ownership (and apparently control) which would result in dismissal of its application. Accordingly, in view of the foregoing, neither the original corporate applicant, nor its claimed successor entity, can claim the mutually exclusive status required for intervention under Algreg.

IV. Conclusion

Ameritel has failed, both in its original Petition and in the subject Appeal, to make the showings required for intervention. The Presiding Judge's determination that Ameritel is not entitled to party status should be upheld, and Ameritel's Appeal denied.

Respectfully submitted,
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April 6, 1995

9/ Ellis Thompson Corporation, Memorandum Opinion and Order and Hearing Designation Order, 9 FCC Rcd 7138, n.1 ("[u]nder 47 C.F.R. § 22.23 substantial changes in beneficial ownership or control of applicants for cellular authorizations may result in their dismissal").

Certificate of Service

I, Dawn Brodus-Yougha, a secretary in the law firm of Gurman, Kurtis, Blask & Freedman, Chartered, hereby certify that I have sent by First Class United States mail, postage prepaid, copies of the foregoing to the following:

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